Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Section 73.3556 of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations	)	MB Docket No. 19-310
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105

PETITION FOR RECONSIDERATION OF REC NETWORKS, MUSICFIRST COALITION AND FUTURE OF MUSIC COALITION

Rachel Stilwell
Samantha Gutierrez
Counsel to REC Networks, musicFIRST Coalition and Future of Music Coalition

Law Offices of Rachel Stilwell
26565 Agoura Road
Suite 200
Calabasas, California 91302

November 20, 2020

TABLE OF CONTENTS

SUMMARY

REC Networks ("REC"), the musicFIRST Coalition and the Future of Music Coalition, (collectively, "Petitioners"), respectfully petition the Federal Communications Commission ("FCC" or "Commission") to reconsider its elimination of 47 CFR § 73.3556, commonly referred to as the Radio Duplication Rule, as applied to commercial FM radio stations and as adopted in the Commission's August 7, 2020 Final Order.[1] The Commission proposed and circulated publicly a Draft Report and Order on July 16, 2020, that would have eliminated this rule only as applied to AM radio stations, while still restricting duplication of programming on commonly-owned FM radio stations within a single market.[2] In its Final Order, however, without warning or justification, the Commission reversed course, eliminating the Radio Duplication Rule in its entirety. The elimination of the FM portion of the Radio Duplication Rule would invite a reduction in diversity of programming, while encouraging corporate radio owners to hoard spectrum.[3] Accordingly, Petitioners request that the Commission revert to its original position, preserving the rule as to FM radio as set forth in its Draft Report and Order.[4]

In its Final Order, the Commission cited the economic fallout of the COVID-19 pandemic, and pandemic-related decreases in advertising revenue, as factors supporting the

[1] The Report and Order, FCC 20-109, MB Docket No. 19-310, *Report and Order*, 35 FCC Rcd 8383 (rel. Aug. 7, 2020), https://docs.fcc.gov/public/attachments/FCC-20-109A1.pdf (hereinafter "Final Order").

[2] In the Matter of Amendment of Section 73.3556 of the MB Docket No. 19-310 Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations, Report and Order, at 18, §15 (July 16, 2020), https://docs.fcc.gov/public/attachments/DOC-365578A1.pdf, (hereinafter "Draft Report and Order").

[3] *See* REC Comments, MB Docket Nos. 19-310 and 17-105, at 2-4 (Jan. 19, 2020), https://ecfsapi.fcc.gov/file/10121214919228/19-310_comments.pdf.

[4] *See generally* Draft Report and Order, *supra* note 2; Final Order, *supra* note 1.

elimination of the FM portion of the Radio Duplication Rule.[5] The COVID-19 pandemic, while the cause of considerable distress for owners of many FM stations, is a temporary event. An elimination of the FM portion of the Radio Duplication Rule, however, would be permanent and overarching. For the radio station owners whose financial struggles force a choice between duplicating programming or allowing one or more of their FM stations to go "dark," waivers of the Radio Duplication Rule have *always* been available and can provide the necessary relief.

These urgent policy implications are not the only reason the Commission should reverse course and vacate its Final Order: the Commission's action to eliminate the FM portion of the Radio Duplication Rule constitutes a violation of the Administrative Procedure Act ("APA"). While the Commission's original Notice of Proposed Rulemaking[6] invited comment as to whether the Radio Duplication Rule[7] should be modified or eliminated,[8] the Draft Report and Order published on July 16, 2020 made clear to interested parties that the Commission intended to vote on eliminating the AM portion of the rule while keeping the FM portion of the rule intact.[9] Thus, after the release of the Draft Report and Order, there was no reason for Petitioners to engage in ex parte communications on this issue. The Final Order that suddenly eliminated the Rule as to FM radio cannot fairly be described as a "logical outgrowth" of the proposed rule, and the Commission should therefore grant this petition for reconsideration.

---

[5] *See* Final Order, *supra* note 1, at 7-8.

[6] *See generally* FCC Seeks Comment on Duplication Radio Programming Rule, https://www.fcc.gov/document/fcc-seeks-comment-duplication-radio-programming-rule-0.

[7] 47 CFR § 73.3556 (Duplication of programming on commonly owned or time brokered stations), https://www.law.cornell.edu/cfr/text/47/73.3556.

[8] FCC Seeks Comment on Duplication Radio Programming Rule, *supra* note 6, at para. I.

[9] *See* Draft Report and Order, *supra* note 2, at 1.

ARGUMENT

A. The Commission's Final Order would, to the extent implemented, harm the public interest in diversity, competition and localism on FM radio airwaves

The Radio Duplication Rule,[10] adopted in 1992 to foster competition, programming diversity, and spectrum efficiency,[11] has long promoted the expression of diverse viewpoints, ownership, competition, and localism. That rule limited duplication of programming on commonly-owned commercial AM or FM radio stations within the same geographic market.[12] Minority and ethnic groups can benefit from the availability of spectrum that might otherwise be warehoused by owners of radio clusters for the sake of duplicating programming on FM signals in a single market.[13]

The elimination of the FM portion of the Radio Duplication Rule would invite a reduction in diversity of programming on the airwaves, while encouraging owners of larger clusters to hoard spectrum.[14] Indeed, the Commission has long recognized that duplication of

---

[10] *Revision of Radio Rules and Policies*, MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755, 27878 ¶ 57 (1992) (*1992 Radio Rules Order*); *see also* 47 CFR § 73.3556.

[11] *See* Notice of Proposed Rulemaking, MB Docket Nos. 19-310 and 17-105, at 1-2, para. 2-4 (Nov. 25, 2019), https://ecfsapi.fcc.gov/file/11252489718350/FCC-19-122A1.pdf, (Hereinafter, "NPRM"); *see also* FCC Fact Sheet, MB Docket Nos. 17-105 and 19-310 (July 16, 2020), https://docs.fcc.gov/public/attachments/DOC-365578A1.pdf.

[12] *See* 47 CFR § 73.3556 (a) (Geographic limits on commonly-owned FM radio stations under the rule were defined as follows: 'If the principal community contours (...predicted 3.16 mV/m for FM stations) of the stations overlap and the overlap constitutes more than 50 percent of the total principal community contour service area of either station.")).

[13] *See* REC Networks Comments, *supra* note 3, at 2-3.

[14] *See id*. at 2-4*; see also* Kern Reply Comments, MB Docket Nos. 19-310 and 17-105, at 1, 6 (Feb. 6, 2020), https://ecfsapi.fcc.gov/file/10207007014678/Kern%20Reply%20Comment%20on%20Broadcast%20Duplication%20Rule.pdf; Common Frequency Initial Comments, MB Docket Nos. 19-310 and 17-105 (Jan. 22, 2019), https://ecfsapi.fcc.gov/file/10207586303981/Common%20Frequency%20Reply%20Dkt%2019-310.pdf.

programming on commonly-owned radio stations in the same market is "the most extreme example of zero program diversity," and "generally results in an inefficient use of the scarce radio spectrum and a lost opportunity to use that spectrum to serve a community."[15]

Elimination of the FM portion of the Radio Duplication Rule can be expected to harm ownership diversity,[16] viewpoint diversity[17] and program diversity[18] resulting in a reduction of local programming of news and information, music, religious programming, sports, and/or other forms of content that would otherwise enrich the lives of local listeners. The antonym of diversity is homogeneity.[19] Every broadcaster who takes advantage of the elimination of the FM portion of the Radio Duplication Rule will, by engaging in duplication of programming, necessarily homogenize its programming over multiple radio frequencies.

The elimination of the FM portion of the rule can also be expected to harm competition in radio. To the extent that larger clusters are allowed to slash programming costs by eliminating programming on one or more FM stations within a given single market, yet continue to sell advertising on such warehoused spectrum, it follows that competing independent radio stations in that shared market cannot take advantage of similarly drastic economies of scale.[20] Similarly,

---

[15] *See* Final Order, *supra* note 1, at 308.

[16] *Id.* at 4 ("Currently, there are people in line, representing all walks of life that would love to run a radio station that would better represent the modern diversity of our great nation than the corporations and mega-churches that currently dominate our 100 channels right now.").

[17] *Id.* at 4 ("Instead of coming up with ways to make things easier for large corporations that want to hoard spectrum in their trust, we need to come up with ways to make things easier for smaller and more local and hyperlocal voices to be heard.").

[18] *See* REC Networks Comments, *supra* note 3.

[19] *See* Peter H. Schuck, Diversity in America: Keeping Government at a Safe Distance, 320-324 (2003).

[20] *See, e.g.,* Statement of Commissioner Geoffrey Starks, at 1, https://docs.fcc.gov/public/attachments/FCC-20-109A5.pdf ("I have concerns that today's decision will undoubtedly make it easier and more cost-effective for large station groups to hoard

local cluster owners who choose to duplicate programming on one or more FM stations in a cluster will thereby give local "listeners fewer choices than more choices thus making radio even less competitive to "non-radio" streaming services."[21] The FM portion of the Radio Duplication Rule, by definition, promotes more local voices on local airwaves. It thereby enhances radio stations' ability to compete with streaming services, giving listeners more options and access to niche and locally-relevant programming.[22]

Eliminating the FM portion of the Radio Duplication Rule would allow owners of clusters of stations to literally reduce the number of local voices on FM airwaves. This would necessarily harm localism on the airwaves in markets where station owners take advantage of such an unnecessarily broad deregulatory measure.[23] And as Commissioner Starks noted in his dissent to that portion of the Final Order eliminating the Rule, rewarding ownership consolidation likely would "translate[] to a lack of locally relevant and diverse programming that addresses local needs and interests."[24] This is all the more concerning to the extent that such duplicated programming were to consist of nationally syndicated programming or voice-tracked programming from another remote location.[25]

---

local stations without any obligation to provide significant programming that meets local community needs. Moreover, I fear it will reward ownership consolidation, and thus will likely exacerbate an already huge disparity in the number of media outlets owned and controlled by people of color and women, which often translates to a lack of locally relevant and diverse programming that addresses local needs and interests.").

[21] *See* REC Networks Comments, *supra* note 3, at 4.

[22] *See id.* at 2, 4 ("Instead of coming up with ways to make things easier for large corporations that want to hoard spectrum in their trust, we need to come up with ways to make things easier for smaller more local and hyperlocal voices to be heard.").

[23] *See id.*

[24] *See* Statement of Commissioner Geoffrey Starks, *supra* note 20, at 1.

[25] *See generally* REC Networks Comments, *supra* note 3.

For each of these reasons, it is imperative that the Commission grant this Petition for Reconsideration and restore the Radio Duplication Rule as to FM Radio.

B. FM station owners can get relief without eliminating the FM portion of the Radio Duplication Rule

When the Commission suddenly decided, during the Sunshine Agenda Period, to switch from its prior stated intent of keeping the FM portion of the Radio Duplication Rule intact to eliminating it altogether, the scope of the Commission's actions with respect to the FM band were unnecessarily and unforeseeably broad. Although the NPRM had sought comment about whether to eliminate or modify the FM portion of the rule, the Draft Report and Order that was circulated publicly -- and among Commissioners for consideration of a vote -- prior to the commencement of the Sunshine Agenda Period, indicated to interested parties that the Commission intended to keep the FM portion of the rule intact.[26] Yet the majority of Commissioners ultimately decided to heed the NAB's request to take the very broad step of eliminating the FM portion of the rule entirely.

Waivers from the Radio Duplication Rule have always been available to radio stations facing challenges to compliance. In the rare event that an FM station must choose between duplicating programming on locally-owned FM stations or allowing one or more FM stations to go dark (*i.e.*, cease broadcasting altogether), it can request a waiver of the rule. Indeed, the Commission's Draft Report and Order specifically relied on this fact in deciding to retain the FM

[26] *See* Draft Report and Order, *supra* note 2, at 8, para. 14 ("We conclude that the record does not demonstrate that eliminating the radio duplication rule as applied to the FM service would serve the public interest, as the FM service does not face the same persistent challenges as the AM service that eliminating the rule for AM stations is intended to mitigate. Nor, however, do we find that the record supports tightening or expanding the radio duplication rule for the FM service, as requested by some commenters. Accordingly, we retain the radio duplication rule for FM stations in its current form. In so doing, however, we recognize the existing waiver process as a method for regulatory relief where warranted.").

portion of the Radio Duplication Rule.[27] Waivers at FM stations, which can be granted either temporarily or permanently, on a case-by-case basis, are more appropriate and narrowly tailored remedies as compared to an overarching elimination of the FM portion of the Radio Duplication Rule.[28]

History has shown that the Commission's past drastic deregulatory actions related to local AM/FM radio (where waivers and partial rule modifications might have instead been used as a test-bed for at least some period of time) have resulted in drastic unintended consequences that harmed the public interest in diversity, local competition and localism.[29] Wholesale elimination of the FM portion of the Radio Duplication Rule is an unsupported, unnecessary and drastic action, which may result in duplication of programming on a far larger scale than expected, in contravention of the public interest. Because the Commission decided during the Sunshine Agenda Period to abruptly switch from relying on waivers for as-needed relief to a wholesale elimination of the FM portion of the rule, Petitioners had no opportunity to weigh in on how that late-breaking decision might result in broader results than the Commission bargained for. The Commission just took the NAB's word that results should be expected to be minimal, without seeking further comment or data on the matter.[30]

In its reversal of course during the Sunshine Agenda Period, the Final Order cited supposed shortcomings of the waiver process, claiming that it does not suffice in times of

---

[27] *See* Draft Report and Order, *supra* note 2, at 8-9, para. 15-16.

[28] *See id.* at 14-15; *see also* Statement of Commissioner Geoffrey Starks, at 20, https://docs.fcc.gov/public/attachments/FCC-20-109A5.pdf.

[29] *See generally* Peter DiCola and Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians?: A Report on the Effects of Radio Ownership Consolidation following the 1996 Telecommunications Act*, Future of Music Coalition (Nov. 18, 2002), http://www.futureofmusic.org/sites/default/files/FMCradiostudy.pdf.

[30] Final Order, *supra* note 1.

emergency.[31] As Commissioner Starks pointed out in his dissent, however, the record contained no evidence of particular burdens associated with the waiver process,[32] and the Final Order would be permanent. To the extent the Commission based its reversal on an assertion that few owners of FM stations were to take advantage of the elimination of the rule,[33] the Commission's ruling imposed a drastic remedy that shortchanges the careful tailoring and analysis available through the waiver process. Indeed, the conclusion that "industry-wide relief is appropriate" though few will seek it is internally inconsistent with the rule reversal, and the Commission has the ability to eliminate waiver fees rather than disposing with the remedy altogether.[34]

C. The Commission's Final Order violates the Administrative Procedures Act

Under the Administrative Procedures Act, an agency must give adequate notice of proposed changes so that interested parties can meaningfully address them in their communications with the agency.[35] While final rules may differ from proposed regulations, they

[31] *See id.* at 7-8, para. 13-14.

[32] *See* Statement of Commissioner Geoffrey Starks, *supra* note 20 ("Also absent from the record is any evidence that FM licensees have found the existing 25 percent duplication allowance to be insufficient for responding to emergencies, particularly given their claim that they have no incentive to simulcast the same programming on multiple stations for long periods of time.").

[33] *See* Final Order, *supra* note 1, at ¶ 16 ("[W]e agree with NAB's assertion that 'airing diverse content on commonly owned stations is the best way to reach the widest audience possible and maximize revenues.' Therefore, although in today's Order we provide additional flexibility to broadcast radio stations, we believe that licensees will prefer to maximize the potential for their stations to reach the greatest number of listeners with the greatest amount of programming. That is, **we do not believe that duplication will be a common practice by station owners** as a substantially increased amount of it is unlikely to be well-received by the marketplace.") (Emphasis added).

[34] *See* Procedures for Filing Requests for Waiver, Reduction and Deferral of Regulatory Fees, FCC (Sept. 18, 2019), https://docs.fcc.gov/public/attachments/DOC-359738A1.pdf.

[35] *See NRDC v. United States EPA*, 279 F.3d 1180, 1186-1188 (9th Cir. 2002).

need to be a "logical outgrowth" of the proposed regulations.[36] The elimination of the FM portion of the Radio Duplication Rule is not a logical outgrowth of the Commission's proposed rule change, and the Commission should therefore vacate its Final Order and instead revert to the 1992 Radio Duplication Rule as applied to FM stations.

Any agency that promulgates rules that fail to be a logical outgrowth of proposed rules violates the APA.[37] If, after notice and comment, an agency alters the proposed rule, a new comment period will not be required so long as the modified rule is a "logical outgrowth of the published proceedings."[38] Whether a final rule is a "logical outgrowth or a reasonable development of a proposed rule" is a question that "must be answered on a case-by-case basis because the D.C. Circuit has provided "no precise definition of what counts as a 'logical outgrowth[.]'"[39] Therefore, the Court must examine the specific facts of each applicable case to determine whether the final rule was a logical outgrowth of the proposed rule.[40]

As will be explained further below, the elimination of the FM portion of the Radio Duplication Rule is not a logical outgrowth of the Commission's proposed rule change. In order

---

[36] *See Shell Oil Co. v. EPA*, 950 F.2d 741, 750-53 (D.C. Cir. 1991); *see also Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 326 (citing *United Steelworkers of Amer., AFL-CIO-CLC v. Schuylkill Metals Corp.*, 828 F.2d 314, 317-18 (5th Cir. 1987)) ("'If, after notice and comment, the agency alters the proposed rule, a new comment period will not be required so long as the modified rule is a 'logical outgrowth of the published proceedings.'").

[37] *See Shell Oil Co. v. EPA*, 950 F.2d at 750-53.

[38] Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 326 (5th Cir. 2001) (citing *United Steelworkers of Amer., AFL-CIO-CLC v. Schuylkill Metals Corp.*, 828 F.2d 314, 317-18 (5th Cir. 1987)).

[39] *See Nat'l Rest. Ass'n v. Solis,* 870 F. Supp. 2d 42, 53 (D.D.C. May 29, 2012) (citing *Nat'l Ass'n of Psychiatric Health Sys.*, 120 F. Supp. 2d 33, 40, citing *Nat'l Mining Ass'n*, 116 F.3d 520, 531).

[40] *See Nat'l Rest. Ass'n v. Solis,* 870 F. Supp. 2d at 53.

to understand why this is the case, it is helpful to review a timeline of the Commission's actions with respect to its eventual vote to eliminate the FM portion of the Radio Duplication Rule.

On November 22, 2019, the Commission adopted a Notice of Proposed Rulemaking,[41] which invited comment as to whether the Radio Duplication Rule should be kept, modified or eliminated with respect to both AM and FM bands.[42] The NPRM did not indicate that the Commission had a particular course of action in mind with respect to the Radio Duplication Rule; rather the NPRM indicated that the Commission was contemplating many different possible courses of action with regard to the AM and FM portions of the rule, respectively.[43]

In January of 2020, REC Networks and others filed comments arguing against elimination of the FM portion of the Radio Duplication Rule. The NAB filed comments, and later reply comments, arguing in favor of eliminating the FM portion of the rule as well as the AM portion of the rule. Then on July 16, 2020, the Commission released a tentative agenda for its August 2020 Open Meeting, and simultaneously circulated to all Commissioners for consideration and vote, a Draft Report and Order that concluded that the FM Rule should be kept unchanged.[44] The Draft Report and Order found that there were insufficient benefits to justify eliminating the FM portion of the rule, which still served the public interest, including by encouraging "the diversification of programming on commonly owned FM stations."[45] The Draft Report and Order stated in part:

> **We agree with REC that retaining the radio duplication rule for FM stations ensures 'some basic level of diversity and . . . prevent[s] spectrum**

[41] *See generally* FCC Seeks Comment on Duplication Radio Programming Rule, *supra* note 6.

[42] *Id.* at para. I.

[43] *See generally* NPRM, *supra* note 11.

[44] Draft Report and Order, *supra* note 2, at 18, § 15.

[45] *Id.* at 12.

> **warehousing.'** Moreover, the record provides no evidence that the current limit restricting the duplication of programming to 25% of the station's average broadcast week harms FM broadcasters. Thus, we retain the radio duplication rule for FM stations.[46]

Two weeks later, on July 30, on the day before the Sunshine Agenda Period began on this docket, the General Counsel of the NAB called senior aides to Commissioners Pai and Carr, arguing that the FM Rule should be eliminated and that the public interest would be served only if "FM broadcasters have the flexibility to quickly and effectively repurpose costly programming, where appropriate."[47] The effect of the NAB's timing its ex parte call, on the day before the commencement of the Sunshine Agenda Period, was to ensure that Petitioners would not be able to speak to anyone at the Commission about the matter on an ex parte basis prior to the Commission's vote. The timing of these actions is an affront to the stated purpose of the Commission's ex parte rules, namely to "ensure the fairness and integrity of its decision-making."[48]

On August 6, 2020, the Commission voted 3-2 to adopt a Final Report and Order that completely eliminated the Radio Duplication Rule for both the AM and FM bands, representing a complete and unforeseeable reversal of its earlier position.[49] Thus, after having agreed with REC Networks in its Draft Report and Order that the FM portion of the rule remained in the

---

[46] *Id.* at 8, §15 (Emphasis added).

[47] NAB Ex Parte Comments, MB Docket Nos. 19-310 and 17-105 (July 30, 2020), https://ecfsapi.fcc.gov/file/10730744503936/Radio%20Duplication%20Ex%20Parte%207-27-20.pdf.

[48] 47 C. F. R. §§ 1.1200–1.1216 (2011), https://www.fcc.gov/proceedings-actions/ex-parte/general/ex-parte-rules-2011.

[49] Final Order, *supra* note 1.

public interest since it ensures "some basic level of diversity and . . . prevent[s] spectrum warehousing," the Final Order suddenly claimed:

> We conclude that the record demonstrates that eliminating the radio duplication rule as applied to the FM service would serve the public interest. Although the FM service does not face precisely the same technical and economic challenges as the AM service, we find that the record supports eliminating the rule for FM stations in order to provide greater flexibility to address issues of local concern in a timely fashion, particularly in a time of crisis.[50]

The Commission then said the opposite of what it had said in its Draft Report and Order with regard to REC's comments: "[a]ccordingly, bare assertions as to the continued usefulness of the radio duplication rule for the FM service—for instance, that the rule ensures 'some basic level of diversity and . . . prevent[s] spectrum warehousing'—are not persuasive."[51]

Because the Commission's sudden about-face occurred during the Sunshine Agenda Period just before the Commission's vote,[52] Petitioners had no way of finding out about it and had no way of weighing in on the Commission's change of course. No amount of diligence on Petitioners' part could have resulted in Petitioners learning about the Commission's decision to do the opposite of what it had said it intended to do with respect to the FM Rule.

The United States Court for Appeals in *Public Citizen, Inc. v. Mineta* noted that it has "**refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities.**"[53] A "final rule is not the logical outgrowth of the proposed rule if the

---

[50] *See id.* at 13.

[51] *Id.* at 8-9.

[52] *See* Statement of Commissioner Jessica Rosenworcel (Aug. 8, 2020), https://docs.fcc.gov/public/attachments/DOC-366006A1.pdf ("But sometime in the last 36 hours, the agency threw this approach away. It decided instead it would eliminate the policy in the AM band and FM band in one fell swoop.").

[53] *Public Citizen, Inc. v. Mineta*, 427 F. Supp. 2d 7, 15 (DC Cir. 2006) (Emphasis added); *see also Environmental Integrity Project v. EPA*, 368 U.S. App. D.C. at 425.

agency's final rule was the opposite of the proposed rule."[54] "If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration."[55] The court continued: a logical outgrowth of the proposed rule "does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse."[56]

The D.C. Circuit, when considering whether an agency's final rule is a "logical outgrowth" of a proposed rule, has explained that if an agency, after publishing a notice of proposed rulemaking, "alters its course in response to the comments it receives," in most cases, little purpose would be served by a second round of comment.[57] A second round of comment is not required if the final rule promulgated by the agency is a "logical outgrowth" of the proposed rule.[58] That standard is applied by asking whether "'the purposes of notice and comment have been adequately served,' that is, whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule."[59]

---

[54] *Public Citizen, Inc. v. Mineta*, 427 F. Supp. 2d at 15 (citing *Environmental Integrity Project v. EPA*., 368 U.S. App. D.C. at 425).

[55] *Public Citizen Inc. v. Mineta*, 427 F. Supp. 2d at 15; *Environmental Integrity Project v. EPA.*, 368 U.S. App. D.C. at 996-998.

[56] *Environmental Integrity Project v. EPA*., 368 U.S. App. D.C. at 425.

[57] *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (citing *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)); *see, e.g.*, *Chemical Waste Management v. EPA*, 976 F.2d 2, 28 (D.C. Cir. 1992); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 546-47 (D.C. Cir. 1983), *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991)).

[58] *American Water Works Ass'n v. EPA*, 40 F.3d at 1274.

[59] *Id.* (citing *Fertilizer Institute v. EPA*, 935 F.2d at 1311).

In the current proceeding, the Commission's NPRM requested comment as to whether the Radio Duplication Rule should be retained, eliminated or modified with respect to either/both the AM band and FM band. REC and others filed comments in favor of retaining the rule as applied to the FM band, and the NAB argued in favor of eliminating the rule altogether. The Commission's Draft Report and Order, published July 16, 2020, reflected consideration of all of these comments, and proposed that the FM portion of the rule be kept as-is, finding it to be in the public interest, citing REC's comments as persuasive.[60] At that point in time, the Commission had forged its course and little purpose would have been served by a second formal notice and comment period on the issue of retaining the FM portion of the Radio Duplication Rule. However, once the Commission abruptly decided to reverse course and eliminate the FM portion of the rule entirely, public comment was warranted. Had the Draft Report and Order instead stated an intention to completely eliminate the FM Rule, Petitioners would have been able to object to such action prior to the commencement of the Sunshine Agenda Period. Instead, the Commission gave no reason to anticipate its drastic change of course, such that Petitioners were excluded from commenting on this important rule change.

The National Association of Broadcasters may argue that because the NPRM included a solicitation of comments about whether the FM portion of the Radio Duplication Rule should be eliminated, Petitioners should have foreseen that the Commission would ultimately vote to eliminate the rule. However, in 2005, the Court of Appeals for the D.C. Circuit, while vacating a rule promulgated by the Mine Safety and Health Administration (MSHA), discussed what constitutes the "the outer limits of the 'logical outgrowth' doctrine."[61] That discussion is salient

[60] Draft Report and Order, *supra* note 2, at 4.

[61] *See Int'l Union, UMW v. MSHA*, 407 F.3d 1250, 1261 (D.C. Cir. Ct 2005).

here. The court distinguished its 1988 decision in *Natural Resources Defense Council, Inc. v. Thomas*, which the court had acknowledged "stretched the concept of 'logical outgrowth' to its limits."[62] In *Natural Resources Defense Council*, a comment on a proposed rule suggested a regulatory approach similar to the approach ultimately adopted by the applicable agency.[63] The agency had, after publishing a notice of proposed rulemaking, "***issued a public notice advising of the new approach two weeks prior to final promulgation of the rule, and the interested parties were afforded the opportunity to file objections prior to final promulgation of the rule***."[64] Accordingly, the court in *Natural Resources Defense Council* upheld the applicable regulation as being a "logical outgrowth" of the applicable notice of proposed rulemaking, since the public had an opportunity to comment on the proposed rule after the applicable public notice indicating the agency's intent.[65]

By contrast, the D.C. Circuit, in its 2005 case involving MSHA, noted that "'no comments suggested" a particular numerical cap on technical aspects of mine ventilation equipment, but "***more importantly, MSHA did not afford a comparable public notice of its intent to adopt, much less an opportunity to comment on***, such a cap."[66] In part because the public did not have notice of the agency's actual intent to adopt a specific course of action and an ability to comment on it, the D.C. Circuit vacated the applicable rule on grounds that the

---

[62] *Natural Resources Defense Council, Inc. v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir. 1988).

[63] *See Int'l Union, UMW v. MSHA*, 407 F.3d at 1259-1261.

[64] *See id.* at 1261 (Emphasis added).

[65] *See id.* at 1261 (citing Natural Resources Defense Council v. Thomas, 838 F.2d at 1243).

[66] *See id.* (Emphasis added).

promulgated cap was not a "logical outgrowth" of the applicable notice of proposed rulemaking.[67]

In this docket related to the FM portion of the Radio Duplication Rule, while the Commission's NPRM originally did include a solicitation for comment on whether it should keep, modify or eliminate the FM portion of the Radio Duplication Rule, the agency indeed "issued a public notice advising of [its] new approach" just three weeks prior to its elimination of the rule, but the new approach described in the public notice was the ***opposite*** of what the agency ultimately voted to do with respect to the FM band.[68] Whereas the D.C. Circuit struck down a rule promulgated by the MSHA because the agency did not afford a public notice "of its intent to adopt"[69] the applicable regulation, in the present docket, the Commission did afford a public notice -- of its intent to keep the FM portion of the Radio Duplication Rule[70] -- but instead completely eliminated it in a vote three weeks later.[71]

Here, since the Commission gave public notice of its intent and then completely changed its mind after the commencement of the Sunshine Agenda Period, Petitioners were specifically prohibited from communicating with the Commission on an ex parte basis about the abrupt change. Petitioners would have objected to the majority's new plan to eliminate the FM portion of the rule if they had been afforded the opportunity to do so.

Notably, the fact that the Commission wound up adopting a Final Order that eliminated the FM portion of the rule, without any notice or comment period on that change, was a surprise

---

[67] *See id.*

[68] *See id.*

[69] *See id*.

[70] *See* Draft Report and Order, *supra* note 2.

[71] *See generally* Final Order, *supra* note 1.

to Commissioners Rosenworcel and Starks, as well as to Petitioners. Commissioners Rosenworcel and Starks both objected to this abrupt switcheroo in their respective dissents to the Commission's elimination of the FM portion of the rule.

Commissioner Rosenworcel prefaced the dissenting portion of her statement by noting how eliminating the AM portion of the rule was an uncontroversial move that could have provided "a smart test bed" to see how localism, competition, and diversity would fare "prior taking any action to weaken or eliminate limitations on duplication of programming on the FM band."[72] Commissioner Rosenworcel then continued:

> But sometime *in the last 36 hours*, the agency threw this approach away. It decided instead it would eliminate the policy in the AM band and FM band in one fell swoop. But the signal quality issues in these bands are totally different. The economic issues are not identical and the impact of content duplication is not the same. So what we have is yet another small chip in our principles. Because we have another decision that rushes ahead without doing the due diligence needed to consider the impact on localism, competition, and diversity.[73]

Commissioner Starks similarly questioned the Commission's sudden and dramatic change of heart. Starks first noted that only three weeks prior to the vote, Chairman Pai had presented for the Commission's vote an uncontroversial item granting AM broadcasters the opportunity to duplicate programming given unique technical and economic challenges that AM broadcasters currently confront.[74] Noting that the majority of commenters expressed agreement with at least some relaxation of the rule for AM broadcasters, Starks then wrote:

> Only one party advocated in favor of relaxing the rule for FM stations, which explains why the earlier draft concluded that the record did not support eliminating the rule as applied to FM stations. The majority now finds "that the benefits of eliminating the rule for FM licensees outweigh any potential negative impacts on public interest objectives of competition, program diversity, and spectrum

[72] Statement of Commissioner Jessica Rosenworcel, *supra* note 52, at 1-2.

[73] *Id.* at 1-2 (Emphasis added).

[74] *See* Statement of Commissioner Geoffrey Starks, *supra* note 20.

> efficiency for which the radio duplication rule was originally adopted." Unfortunately, the majority doesn't explain the dramatic change of heart, nor does it explain how the benefits to FM broadcasters outweigh the public interest in protecting truly local broadcast programming and local audiences from the potential harms caused by unfettered duplicate programming.[75]

Starks noted that while the Draft Report and Order had also recognized that retaining the Radio Duplication Rule for the FM service would "encourage the diversification of programming on commonly owned FM stations and discourage spectrum warehousing, consistent with the stated goals of the rule. That is as true today as it was three weeks ago, but that language is gone as well."[76] We agree that the Commission's abrupt elimination of the FM portion of the Radio Duplication Rule was highly problematic both substantively and procedurally.

CONCLUSION

For the foregoing reasons, the Commission should grant this Petition for Reconsideration and vacate its elimination of the Radio Duplication Rule as applied to commercial FM radio stations.

Respectfully Submitted,

REC NETWORKS

/s/ Michelle Bradley, CBT
11541 Riverton Wharf Rd.
Mardela Springs, MD 21837
202 621-2355

MUSICFIRST COALITION

/s/ Trevor Francis
musicFIRST Coalition
733 10th Street NW, 10th Floor
Washington DC 20001

[75] *See id.*

[76] *See id.*

FUTURE OF MUSIC COALITION

/s/ Kevin Erickson
Director
Future of Music Coalition
P.O. Box 73274
Washington DC 20056

November 20, 2020